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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960 No. 67

Abraham Braunfeld, Isaac Friedman, Alter Diament, S. David Friedman and Joseph R. Friedman,
Appellants,

v.

Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

and

Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

On Appeal from the Final Order of a Three-Judge Court Sitting in the Eastern District of Pennsylvania Pursuant to 28 U. S. C. § 2281 *et seq.*

BRIEF FOR PENNSYLVANIA RETAILERS' ASSOCIATION, INTERVENING DEFENDANT

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Thomas J. Gibbons, Commissioner of Police of the City of Philadelphia, and Victor H. Blanc, District Attorney of the City of Philadelphia,

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Pennsylvania Retailers' Association, Intervening Defendant,
Appellees.

BRIEF FOR PENNSYLVANIA RETAILERS' ASSOCIATION, INTERVENING DEFENDANT

COUNTER-STATEMENT OF QUESTIONS PRESENTED.

1. Whether the Pennsylvania Sunday retail closing law of 1959 and the enforcement thereof constitute an establishment of religion in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether the application of a Sunday closing law to business establishments of individuals whose religion requires them to refrain from labor at other times during the customary business week, interferes with the free exercise of religion by those individuals and hinders their faith in its ability to compete with other sects for adherents in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

3. Whether the Pennsylvania Sunday retail closing law of 1959 violates the equal protection or due process clause of the Fourteenth Amendment to the United States Constitution by applying only to the sale at retail of certain specified commodities.

COUNTER-STATEMENT OF THE CASE.

Appellants, plaintiffs below, seek a permanent injunction restraining enforcement of Pennsylvania Act No. 212 of August 10, 1959, P. L. 660, 18 Purdon's Pa. Stats. Ann. § 4699.10. That Act, which was passed after public hearing and legislative debate, makes it unlawful to sell, or to offer to sell, at retail on Sundays enumerated types of goods and provides penalties for violation thereof. The sale of the subject commodities previously came within the ambit of the general Pennsylvania Sunday closing law, Section 699.4 of the Penal Code of June 24, 1939, P. L. 872, 18 Purdon's Pa. Stats. Ann. § 4699.4. The penalty for violation of the 1939 statute is a nominal fine, whereas the 1959 Act provides for substantial fines and possible jail sentence. Both statutes are found in the Penal Code in Article VI, entitled "Offenses Against Public Policy, Economy and Health."

Plaintiffs allege in their Amended Complaint that each is a retail seller of merchandise subject to the 1959 Act and an observant and orthodox member and adherent of the Jewish religion. They allege that, pursuant to that

faith, each plaintiff closes his place of business from nightfall Friday until nightfall Saturday. Plaintiffs further allege that Friday night and Saturday are the night and day of the week when their competitors do their greatest volume of business.

Plaintiffs have previously kept open their places of business on Sundays in violation of the general Pennsylvania Sunday law cited above. They allege that, if they continue to do so, they will subject themselves to prosecution under the 1959 Act with its higher penalties. Plaintiffs transact considerable business on Sundays. The loss of that business would substantially reduce their incomes and, in one instance, would allegedly cause the enterprise to fail.

Appellees Gibbons and Blanc, defendants below, moved to dismiss the Amended Complaint.[1] The three-judge statutory court granted that motion, relying upon the opinion of another statutory court of the same district in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960). That case, two other appeals involving Sunday laws,[2] and the present appeal have been set down for argument together. 28 U. S. Law Week 3317, 3346 (1960).

SUMMARY OF ARGUMENT.

I.

In our 20th century American society, Sunday is a day of rest, relaxation and recreation, in addition to

[1] Pennsylvania Retailers' Association was granted leave to intervene as a party defendant, the court finding that the "Association has an interest in the above-entitled action sufficient to warrant it to become a party to the action" (R. 9).

[2] *McGowan* v. *Maryland*, October Term, 1960, No. 8; *Gallagher* v. *Crown Kosher Super Market of Mass., Inc.*, October Term, 1960, No. 11.

being the day on which many Christian sects worship. This modern enjoyment of Sunday is now well-established custom and is the result of a trend toward secularization and of improved working conditions.

The decisions of this Court and of our highest State courts have consistently upheld Sunday closing laws on the ground that they represent proper health and welfare statutes, and that such laws are not, in purpose or effect, statutory attempts to further the religious interests of Christian sects which worship on Sunday. *Hennington* v. *Georgia*, 163 U. S. 299 (1896); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

II.

The recent decisions of this Court which have considered the establishment of religion clause of the Federal Constitution hold that, where there is a legitimate secular objective, a statute is valid even though there may be some incidental sectarian benefit. *Everson* v. *Board of Education*, 330 U. S. 1 (1947). The most that can fairly be said against Sunday closing laws is that the uniform day of rest coincides with the Christian day of worship and that in a remote way they make it easier for Sunday worshippers to attend church on that day. That Sunday closing laws may originally have been religiously inspired and today may be supported by some for religious reasons, does not invalidate the legitimate secular purpose which those statutes are designed to accomplish.

III.

The facts of this case do not fall within the familiar litigated restraints upon religion, if they constitute a restraint at all. Appellants contend that, because they have voluntarily sacrificed the business opportunities of Friday night and Saturday for religious reasons, they should be afforded an opportunity on Sunday to recoup a portion of their losses. The loss of the economic oppor-

tunity to sell on Sunday does not raise an issue of religious freedom under any of the decisions of this Court.

Sunday retail selling is not a religious right but only a custom which appellants have adopted. No decision of this Court has ever suggested that, when individuals make economic sacrifices for religious reasons, the Federal Constitution requires a State in general legislation to provide an exemption for such persons. Pennsylvania having determined that Sunday shall be the uniform day of rest and recreation, appellants have no constitutionally guaranteed right to keep their stores open on that day merely because they have closed on Friday night and Saturday in recognition of their religious obligations.

None of the decisions of this Court require the application of the "clear and present danger" test, except where there is direct statutory interference with religious beliefs and the expression thereof. Such interference is not presented by the 1959 Pennsylvania statute, which simply prohibits Sunday retail selling. Similarly, the 1959 Pennsylvania law is a statute of general application to all Pennsylvania retailers selling the described commodities and is not "directed at particular religious, * * * or national, * * * or racial minorities." The *Carolene Products* footnote 4 therefore has no application.

IV.

The 1959 Pennsylvania statute is not unreasonably discriminatory by reason of its increased penalties imposed upon the described commodities. Moreover, the enumeration of alleged inconsistencies in classification does not carry the burden of proof necessary to establish arbitrary classification. The decisions of this Court do not require "mathematical nicety," but prohibit only "invidious discrimination," in classification. *Morey* v. *Doud*, 354 U. S. 457 (1957).

The overwhelming number of State courts have sustained Sunday closing statutes, such as the 1959 Pennsyl-

vania statute, which have been based upon commodity classification and which treat equally all who sell the same commodity at the same level of distribution. This Court has dismissed, for want of a substantial federal question, every appeal which has challenged Sunday closing laws on a classification basis.

There are rational bases for the 1959 Pennsylvania Sunday retail closing law in that, as found by the Court in the companion case, *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), that statute imposed the heavier penalties because the problem of Sunday retail selling had become "newly acute" and the described commodities were the principal categories of merchandise sold. Furthermore, this statute is in aid of the modern enjoyment of Sunday as a day of rest, relaxation and recreation. *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

ARGUMENT.

I. Sunday Closing Laws Have Long Been Recognized as a Legitimate Exercise of the Police Power To Establish a Common Day of Rest and Relaxation for the Benefit of the General Public.

A. Courts Recognize the Welfare Objective of Sunday Closing Laws.

This Court considered challenges to Sunday laws in three decisions at about the turn of the century. Those cases all involved state statutes before this Court had held that the due process clause of the Fourteenth Amendment incorporated the religious freedom guarantees of the First Amendment. Those decisions nonetheless establish that this Court has regarded Sunday laws as "day of rest" statutes and as legitimate exercises of the police power.

In *Soon Hing* v. *Crowley*, 113 U. S. 703, 710 (1885), this Court said:

"* * * Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

In *Hennington* v. *Georgia*, 163 U. S. 299, 304 (1896), this Court stated:

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to

> the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and state, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was 'of admirable service to a State considered merely as a civil institution.' "

See also *Petit* v. *Minnesota*, 177 U. S. 164, 165 (1900). The Pennsylvania Supreme Court had already reached the same conclusions with regard to that State's general Sunday law in *Specht* v. *Commonwealth*, 8 Pa. 312, 323 (1848).

Similar statements are also to be found in the decisions of the highest courts of almost every state in the union. *E.g.*, *Lane v. McFadyen*, 259 Ala. 205, 208, 66 So. 2d 83, 85 (1953); *Humphrey Chevrolet* v. *City of Evanston*, 7 Ill. 2d 402, 405, 131 N.E. 2d 70, 72 (1956); *Tinder v. Clarke Auto Co.*, 238 Ind. 302, 312-316, 149 N. E. 2d 808, 813-815 (1958); *Two Guys from Harrison, Inc. v. Furman*, 32 N. J. 199, 216, 160 A. 2d 265, 274 (1960); *People v. Friedman*, 302 N. Y. 75, 79-80, 96 N. E. 2d 184, 186 (1950), *appeal dismissed*, 341 U. S. 907 (1951).

B. "Latter Day Rationalizations" for Sunday Closing Laws: The Increasing Secularization of American Society and the Improvement of Working Conditions.

Appellants in the present action, in common with others who oppose Sunday laws on religious grounds, devote considerable space in their brief to matters historical, with particular reference to the Roman Emperor Constantine and to the legislative activities of the American

colonies. While such archaeology is no doubt interesting, it appears to have little to do with present-day realities.

Of much greater significance are two more recent trends: the increasing secularization of American society, and improvement of working conditions as a result of the rise of American labor and enlightened management. It seems fair to suggest that with increasing secularization, Sunday closing might well have disappeared from the American scene, absent the movement to improve working conditions.

Without taking cognizance of those developments of the last hundred years, the *amicus* brief of the Synagogue Council of America and the National Community Relations Advisory Council sees fit to describe judicial pronouncements upholding Sunday closing laws as day of rest statutes as "latter day rationalizations." (*Amicus* brief, pp. 16-23.) *Amici* suggest:

> "Only in recent years, particularly after it was recognized that the First Amendment's ban on laws respecting an establishment of religion or prohibiting its free exercise is applicable to the states, has there been an effort to justify the compulsory Sunday laws as welfare rather than religious statutes." (*Amicus* brief, p. 17.)

Wholly apart from the increasing secularization of American society and the improvement of working conditions, *amici* overlook the fact that the Pennsylvania Supreme Court's decision in the *Specht* case, *supra*, to which *amici* refer (*amicus* brief, p. 19), came before the Fourteenth Amendment had even been suggested. Moreover, this Court's decisions quoted above, to which both *amici* and appellants omit any reference, preceded any decision holding that the Fourteenth Amendment made any portion of the First Amendment applicable to the states. Thus, for two reasons, there is no foundation for the charge of bad faith which *amici* level at our courts, both state and federal, in upholding Sunday closing laws.

Appellants similarly charge "[c]areful draftsmanship of the Pennsylvania Amendatory Act in question so as to make it appear as purely civil legislation. * * *" (Appellants' brief, p. 39) They label as "camouflage", and complain of, the omission from "Pennsylvania blue law statutes of the past several years * * * [of any] reference to a deity or to Christianity." (Appellants' brief, p. 40.)[3]

In their attempt to brand the 1959 Pennsylvania Sunday retail closing law as a religious statute, appellants and *amici* have completely ignored the trend toward secularization which has occurred in American society. With the increasing industrial and economic growth of our country in the second half of the 19th century, the American worker was soon burdened with longer hours of work per day, and in many businesses the seven-day work week became commonplace.[4] In this context labor unions were

[3] The omissions about which appellants are concerned are apparently of the phrases "worldly employment" and "Lord's day", both found in the general Pennsylvania Sunday closing law as incorporated into the Penal Code of 1939. In light of the inclusion in that section of other quaint language such as "the dressing of victuals", "bake-houses", "sojourners", "watermen", and "persons removing with their families", the retention of the allegedly offensive phrases can be viewed only as a casual retention of former language which occurs so frequently in codifications. Moreover, as to the use of the modifier "worldly" before "employment", its omission "would have limited people in their *religious* exercises as well and a better argument could have been made for its unconstitutionality in that case." *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, 580, *aff'd p.c.*, 188 Pa. Super. 424, 145 A.2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958).

[4] See, generally, COMMONS, HISTORY OF LABOUR IN THE UNITED STATES, Vols. I & II (1958); LESCOHIER & BRANDEIS, HISTORY OF LABOR IN THE UNITED STATES, Vol. III (1958); MILLIS & MONTGOMERY, THE ECONOMICS OF LABOR, Vols. I-III (1945). With regard to retailing, KIRSTEIN, STORES AND UNIONS 6 (1950), states:

"[A] 112-hour work week was common, and in addition to that awesome schedule, it was not unusual for an unmarried clerk to sleep on the counter at the store in order to wait on whatever trade might chance to come by night. Stores in many communities were open at least part of the day on Sundays and on holidays as well."

born, and the struggle for improved working conditions and shorter hours began.[5] The success of labor unions in this field is a well-known chapter in American history which requires no discussion here.

Because the 1959 Pennsylvania statute relates to retail selling, the struggle to improve working conditions in that business is of particular interest. Labor there sought to obtain early closings on weekdays, Sunday and holiday closings, and establishment of maximum hours per week.[6] As part of that campaign, existing Sunday closing laws were invoked, generally without much success, and additional legislation was sought on that subject.[7] The retail

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[5] See, generally, COMMONS, HISTORY OF LABOUR IN THE UNITED STATES, Vols. I & II (1958); LESCOHIER & BRANDEIS, HISTORY OF LABOR IN THE UNITED STATES, Vol. III (1958); MILLIS & MONTGOMERY, THE ECONOMICS OF LABOR, Vols. I-III (1945). Kirstein relates that, at the 10th annual American Federation of Labor convention in Detroit in December 1890, the Retail Clerks National Protective Association applied for a charter. "The convention was asked to endorse this union, help it organize, and help it abolish Sunday work. The resolution was passed and the union was founded." KIRSTEIN, *op. cit. supra*, at 11.

[6] KIRSTEIN, *op. cit. supra*, at 15-24.

[7] Kirstein reports:

"* * * * In 1897, the Denver, Colorado, local reported that it was planning to have the state Sunday Closing Law tested in the highest court despite the fact that 'recently one of the district judges declared the law unconstitutional.' The Galveston local, after having experienced considerable difficulty in securing enforcement of the state law on this subject, took some violators into the courts, where they were fined $20. From the reports of these efforts, it is apparent that public opinion was indifferent to the Clerks' effort, and few outside the ranks of the union took any interest in the outcome of this continuing fight.

"The Cleveland and Columbus locals, in 1898, sponsored an amendment to the Ohio State Sunday Labor Law which called for closing all stores on the Sabbath. A year later, the Cleveland local sued a merchant, John Alderman, for violation of this law. He was one of a group of West Side merchants, known as 'Seven-Day Businessmen' who refused to sign the Early Closing or the Sunday Closing agreement. When the case was tried, the jury split on the verdict.

"By 1899, the union, apparently feeling that the state laws granted insufficient protection, passed a resolution calling for a Federal Sunday Closing Law. Law suits were brought in various states against merchants who sold goods on Sunday despite the legal prohibition. While the union often won, the amounts that the merchants were fined were so small that the penalty hardly acted as a deterrent to commission of the crime. In one case, a guilty merchant was fined $1 and costs." *Id.* at 20-21.

clerks union found substantial support in their effort to limit work hours and days among proprietors of one-man and family-operated stores as well as among enlightened management which realized that excessive working hours and days not only impaired employee efficiency but also increased overhead.[8] By the time of the beginning of World War II, except for industrial or business activities generally recognized as necessary or essential to our modern-day society, Sunday employment in American business and industry had been gradually reduced to a minimum.

The shortening of the work week, with Sunday generally recognized as a "day off", created additional available leisure time for a large segment of the American working population and resulted in public demand for Sunday public amusement facilities and recreational activities. In response to that demand, most states enacted enabling legislation designed to make available to the public a broad field of amusement and recreational diversions.

The modern-day concept of Sunday as a day of rest, relaxation and recreation, and the appropriateness of legislation to protect that day as such, has recently received judicial recognition by the New Jersey Supreme Court in *Two Guys from Harrison, Inc. v. Furman*, 32 N. J. 199, 215-16, 160 A. 2d 265, 273-274 (1960). In that case Chief Justice Weintraub, speaking for the Court, said:

> "* * * The fact is that Sunday has acquired a special character differentiating it from the other days of the week and this without reference to religious connotation. Today Sunday is many things to many people. It is a day upon which the vast majority of citizens seek respite from the pressures and demands of ordinary routines. To some, it is a day for religious devotion alone. To others, whether or not members of faiths commanding religious observance,

[8] *Id.* at 17.

it is a secular holiday, a day of play, hobbies, recreation or relaxation. To still others, it is a combination of all of these. It is a day for family and friendly reunions. Most people want Sunday for themselves to do as they feel they should, each to prepare himself in his own way to meet the demands of Monday morning.[9]

"Thus the public health and welfare are implicated when the hustle and bustle mount and intrude unreasonably upon opportunities for rest, leisure and diversion. The inroad may be in terms of direct interference as, for example, when commercial activities add to highway traffic to the discomfort of the Sunday driver or otherwise impinge upon a scene conducive to rest, diversion and recreation. The inroad may be indirect but equally real as when those who want to be free on Sunday find the economic aims of their employer compel them to work to hold their jobs, or when the economic impact upon employers requires them and their staffs to remain at the grindstone. Hence we can not say that Sunday may not constitutionally be selected by the legislature in pursuit of a purpose to provide relief from the routine. * * *"

Following the end of World War II, the pre-war concept of Sunday was resumed. Except for activities deemed necessary or essential to our society, industrial and business employment on Sunday was minimal, and the trend toward increased recreational and amusement activities on that day continued.

Then came the 1950's with their spectacular burst of large-scale retail Sunday selling, a business in which

[9] This view finds support among eminent sociologists. See, for example, Margaret Mead, "The Pattern of Leisure in Contemporary American Culture," in Volume 313, *The Annals of the American Academy of Political and Social Science* (1957), reprinted in LARABEE AND MEYERSOHN, MASS LEISURE 10-15 (1958).

unionization of employees is not wide-spread. This development was also described by Chief Justice Weintraub in the New Jersey *Two Guys* case as follows:

> "* * * shortly * * * [after 1951] the scene changed. Retail operations spread rapidly upon highways and Sunday selling mounted dramatically. The urban merchant could not effectively meet the challenge. The major roads, already burdened by non-commercial travel, strained under the added stress. Religious observants of the Lord's Day resented the added hustle and bustle. Economic pressures compelled labor by many who preferred diversion. Thus Sunday closing returned to the stage. Motivations, divergent and internally incongruous, converged upon a single objective. What historically may have been solely a matter of religious concern became a social and economic issue. The [general Sunday closing] statute had not been designed to meet the new problem." 32 N. J. at 209, 160 A. 2d at 270.

See also *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 952 (E. D. Pa. 1959).

This change in the Sunday scene brought forth a new rash of legislative activity. To meet the spread of Sunday automobile sales, both New Jersey and Pennsylvania, in common with other states, passed statutes prohibiting the sale of motor vehicles on Sundays and provided for fines sufficient to deter violators.[10] Then Sunday selling broke out in a new area with the rise of large so-called discount houses, which sprang up along suburban and country highways and operate seven days a week, and of latter day "farmers markets", which sell little, if any, farm produce and specialize in evening and weekend

[10] Colo. Rev. Stats., 13-20-1 (1957 Cum. Supp.); Burns' Indiana Stats. Ann., § 10-4305 (1960 Cum. Supp.); Mich. Stats. Ann. § 9.2701 *et seq.* (1959 Cum. Supp.); N. J. Stats. Ann. 2A:171-1.1 *et seq.* (1959 Cum. Supp.); 18 Purdon's Pa. Stats. Ann. § 4699.9 (1959 Cum. Supp.).

operations. These new threats to Sunday as a day of rest, relaxation and recreation for the general public has resulted in the introduction of new legislation in many states in the past few years[11] and in the passage of Sunday retail closing laws not only in Pennsylvania but also in New Jersey and Virginia.[12]

Thus Sunday closing laws are today a part of the legal structure designed to insure a day of rest, relaxation and recreation. The record of our society, as described above, belies the claim of appellants and others that, because of the existence of other statutes regulating working hours, Sunday closing laws could not be genuine "day of rest" laws. None of those other statutes regulating working hours are capable of providing one day of the week which the working man can spend together with his family and friends in relaxation and recreational pursuits. The historical development of American society has been such that Sunday is the logical uniform day. Our courts have long been closed on Sunday, as have other governmental offices, public and private schools, banks, and business offices. Sunday closing laws serve to extend the same benefits to those who work in factories and in retail establishments. A Wednesday off for the retail clerk does not afford him time to spend with his children who are in school and with his friends, and perhaps his wife, who work the traditional five-day week.

[11] Connecticut, 1959 session, S.B. 475, H.B. 3307, H.B. 3768; Florida, 1959 session, S.B. 682, H.B. 2051; Illinois, 1959 session, H.B. 95; Indiana, 1959 session, H.B. 332; Louisiana, 1960 session, H.B. 1337; Maine, 1959 session, H.B. 758; Maryland, 1959 session, S.B. 458; Massachusetts, 1958 session, H.B. 673, H.B. 2666, 1959 session, H.B. 1997; Michigan, 1960 session, S.B. 1050; Mississippi, 1958 session, H.B. 127, 1960 session, S.B. 1595; Montana, 1959 session, H.B. 264; Nebraska, 1959 session, L. 711; New Jersey, 1958 session, A.B. 22, A.B. 152, A.B. 180, 1959 session, S.B. 7, A.B. 25, A.B. 142, A.B. 656; North Carolina, 1959 session, H.B. 829; Ohio, 1959 session, H.B. 300; Pennsylvania, 1959 session, S.B. 405; South Carolina, 1959 session, H.B. 1814; Utah, 1959 session, S.B. 24; Virginia, 1960 session, S.B. 194, H.B. 279; Wisconsin, 1959 Session, A.B. 600.

[12] N.J. Stats. Ann. 2A:171-5.8 *et seq.* (1959 Cum. Supp.); 18 Purdon's Pa. Stats. Ann. § 4699.10 (1959 Cum. Supp.); Va. Code of 1950, § 18.1-358 *et seq.* (1960 Cum. Supp.).

In enacting the 1959 Sunday retail closing law against a background which over the past half century has witnessed the substantial elimination of Sunday employment and the increase of recreational and amusement activities on that day, the clear purpose of the Pennsylvania legislature, as borne out by the natural and reasonable effect of that statute, is to preserve Sunday as a secular day of rest and relaxation.

II. The 1959 Pennsylvania Sunday Retail Closing Law Does Not Constitute an Establishment of Religion in Violation of the Due Process Clause of the Fourteenth Amendment.

Sunday closing laws have been challenged on many occasions on the ground that such legislation constitutes an establishment of religion. In the period since this Court held the due process clause of the Fourteenth Amendment to incorporate the freedom of religion provisions of the First Amendment, this Court has dismissed appeals "for want of a substantial federal question" from three state court decisions upholding Sunday closing laws against such an attack. *State* v. *Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 132 (1958); *State* v. *Ulner*, 105 Ohio App. 546, 143 N. E. 2d 849 (1957), *aff'd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 131 (1958); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), *appeal dismissed*, 341 U. S. 907 (1951).

Recent decisions of other state appellate courts are in accord. *E.g.*, *State* v. *Shuster*, 145 Conn. 554, 557, 145 A. 2d 136, 197-198 (1958); *McGowan* v. *State*, 220 Md. 117, 122-123, 151 A. 2d. 156, 159 (1959), *probable jurisdiction noted*, 362 U. S. 959 (1960); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 215-217, 160 A. 2d 265, 273-274 (1960); *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, 576-577, *aff'd p.c.*, 188 Pa. Super 424, 145 A. 2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958); *State* v.

Grabiński, 33 Wash. 2d 603, 608, 206 P. 2d 1022, 1025 (1949).

Intervening defendant respectfully submits that the above decisions represent the correct view and that the seemingly contrary language in *Crown Kosher Super Market of Mass., Inc.* v. *Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960), is incorrect. That language apparently does not constitute a holding.[13]

A. The Decisions of This Court Do Not Support Appellants' Contention That Sunday Closing Laws Constitute an Establishment of Religion.

In the last fifteen years, this Court has given the establishment of religion clause full consideration in three cases involving state action alleged to violate the due process clause of the Fourteenth Amendment. Although the encouragement afforded religion was obvious in all three cases, the majority of the Court found an establishment of religion in only the case in which there was active and direct support of religion. *McCollum* v. *Board of Education*, discussed *infra*.

This Court's most detailed pronouncement on the "establishment of religion" clause is found in *Everson* v. *Board of Education*, 330 U. S. 1 (1947). There the majority of the Court found no violation in the use of public funds to reimburse parents for money expended for public bus transportation of their children to Catholic parochial schools as well as to public schools. The Court stated:

[13] The court's opinion on petition for rehearing contains the following language:

"Ground No. 11 objects that there is some inconsistency between the court's decree, which holds the statute unconstitutional merely as applied to petitioners in this case, and the court's opinion, which states that the statute violates the Federal Constitution because it was a statute respecting an establishment of religion. This objection is based upon a tortured reading of one phrase of the opinion torn out of context. It is apparent that the only question argued or considered was the alleged unconstitutionality of the statute as applied to those complaining persons." 176 F. Supp. at 493.

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.' *Reynolds* v. *United States*, * * * [98 U. S. 145], at 164.

"We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power. See *Interstate Ry.* v. *Massachusetts*, Holmes, *J.*, * * * [207 U. S. 79], at 85, 88. New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists,

Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

"Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools * * *" 330 U. S. at 15-17.

"This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce* v. *Society of Sisters*, 268 U. S. 510. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." 330 U. S. at 18.

In the next case, *McCollum* v. *Board of Education*, 333 U. S. 203 (1948), this Court found a violation of the "establishment of religion" clause in the use of public school buildings for "released time" religious instruction

by teachers supplied by the various faiths subject, however, to the approval and supervision of the superintendent of schools. In finding unconstitutionality, this Court concluded:

> "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State." *Id.* at 212.

In the third and most recent case, *Zorach* v. *Clauson*, 343 U.S. 306 (1952), this Court found nothing unconstitutional in releasing New York City children during public school hours to receive religious instruction elsewhere pursuant to Section 3210 of the New York Education Law and the regulations thereunder. This Court said:

> "Moreover, apart from that claim of coercion [of which the Court found no evidence], we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment. * * *" *Id.* at 312.
>
> "In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion." *Id.* at 315.

From these three decisions a clear pattern emerges as to what type of state action violates the "establishment of religion" clause:

> The *Everson* case holds that where the sectarian benefit to be derived is slight compared to the secular objective of the state action, there is no violation.
>
> The *Zorach* case holds that where the only object of the state action is to accommodate the spiritual needs of the people, not even such accommodation is unconstitutional so long as such accommodation is afforded to all religions.
>
> The *McCollum* case holds that where there is direct support of religious institutions, whether selective or universal, as where the tax funds are used, then there is an establishment of religion.

Sunday closing laws clearly come within the first of these three categories, in which category state action is permissible. As discussed above (pages 6-16), Sunday laws have a wholly permissible and legitimate secular purpose—to afford a uniform day of rest, relaxation and recreation for the general public. As pointed out by the New York Court of Appeals in *People* v. *Friedman*, *supra*:

> "It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion. * * *" 302 N. Y. at 79, 96 N. E.2d at 186.

The most that can fairly be said against Sunday closing laws is that they make it easier for those belonging to religious faiths which hold worship services on Sunday and who so desire to attend such services. This benefit is an even more incidental one than that con-

sidered valid by this Court in the *Everson* case, where the state paid to have children delivered to the door of the religious institution.

B. Pennsylvania Has Determined That Its Sunday Closing Laws Are "Day of Rest" Statutes.

The 1959 Pennsylvania Sunday retail closing law has been before the Pennsylvania Supreme Court only on an appeal from the dissolution of a temporary injunction. *Rubin* v. *Bailey*, 398 Pa. 271, 157 A. 2d 382 (1960), in which the court did not rule on the constitutional merits of the statute. Taking note of the decision in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E. D. Pa. 1959), and of the similarity of the Federal and State constitutional provisions, both having been raised in *Rubin* v. *Bailey*, the Court concluded:

> "* * * Obviously, therefore, we cannot say that the court below acted unreasonably in concluding that the presumption of the statute's constitutional validity has not been sufficiently impugned to warrant the continuance of the preliminary injunction." 398 Pa. at 277, 157 A. 2d at 885.[14]

In the only case to reach the Pennsylvania Supreme Court involving the 1939 general Sunday closing law, that Court refused to grant the writ of *allocatur* necessary to review the Superior Court decision upholding the

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[14] By the citation of two Pennsylvania trial court decisions in Philadelphia County, appellants in the present appeal and in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36, imply that Pennsylvania trial courts have uniformly struck down the 1959 Act. They omit any reference to the final adjudication of the Chancellor in *Rubin* v. *Bailey*, which upheld the constitutionality of the statute under both the Federal and Pennsylvania Constitutions and denied injunctive relief. (Pa. C.P., Mont., Nov. Term, 1959, Nos. 28, 34, March 31, 1960).

statute. *Commonwealth* v. *Bauder*, 188 Pa. Super. xxviii (1958).[15]

More than a hundred years ago the Pennsylvania Supreme Court held that the Act of 1794, 3 Sm. L. 177, § 1, the predecessor of the 1939 general Sunday law, was designed to establish a uniform day of rest and not to compel any religious observance. *Specht* v. *Commonwealth*, *supra*, 8 Pa. at 323. Moreover, as noted above, the Pennsylvania legislature has placed both the general Sunday closing law and the 1959 Sunday retail closing law in an article of the Penal Code entitled "Offenses Against Public Policy, Economy and Health."

In *Specht*, the Pennsylvania Supreme Court went on to state with regard to the Act of 1794:

> "It intermeddles not with the natural and indefeasible right of all men to worship Almighty God according to the dictates of their own consciences; it compels none to attend, erect, or support any place of worship, or to maintain any ministry against his consent; it pretends not to control or to interfere with the rights of conscience, and it establishes no preference for any religious establishment or mode of worship. It treats no religious doctrine as paramount in the state; it enforces no unwilling attendance upon the celebration of Divine Worship. It says not to the Jew or Sabbatarian, You shall desecrate the day you esteem as holy, and keep sacred to religion that *we* deem to be so. It enters upon no discussion of rival claims of the first and seventh days of the week, nor pretends to bind upon the con-

[15] Section 7[e] of the Act of June 24, 1895, P.L. 212; 17 Purdon's Pa. Stats. Ann. § 190, provides for appeals from Superior Court judgments, among other things, when Federal or State constitutional questions are involved. However, the statute "contemplates only actual, open and unsettled constitutional questions, not so-called questions that have theretofore been raised, fully considered and more than once definitively settled. * * *" *Boyle's Retail Liquor License*, 190 Pa. 577, 579, 42 A. 1025, 1026 (1899).

science of any man any conclusion upon a subject which each must decide for himself. * * *" 8 Pa. at 325.

On this point, we find it necessary to correct what we consider to be a gross distortion of the findings of fact of the three-judge statutory court in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944 (E.D. Pa. 1959), on which the three-judge statutory court in the present case relied. Appellant's brief in the *Two Guys* appeal states that the trial court found as a fact that the purpose of the 1959 Pennsylvania Sunday retail closing law "was to enforce the cessation of work on Sunday in order to commemorate weekly the sectarian religious event and doctrine of the Resurrection of Jesus Christ, the same event and doctrine as are commemorated by the Christian Easter (Rec. 276, 290). * * *" (*Two Guys* brief, p. 5.) This same alleged finding of fact is repeated so frequently in that brief that it becomes the cornerstone of its argument. (*Id.* at 9, 12, 16, 19, 29, 30.)

Those record references are obviously to the following language in the *Two Guys* opinion and supplementary findings of fact. At 276 of the record, the court opinion reads as follows:

> "* * * *The argument* is that this required cessation of business on Sunday is an enforced expression of respect for and acknowledgment of the sacred character and religious symbolism of the Christian Sabbath, a religious institution commemorating the resurrection of Christ. There is testimony which establishes as a fact in this record that this view of the religious significance of enforced Sunday work stoppage is sincerely held by many persons whose religion does not recognize the divinity or resurrection of Jesus of Nazareth or the sacredness of Sunday as the 'Lord's day'." (Emphasis added.)

In its Supplementary Findings of Fact, the court found:

> "1. Sunday is a day designated for religious services and observances by Christians, with the exception of Seventh Day Adventists and Baptists. The Christian Sabbath commemorates and honors the Resurrection of Christ. It is marked by a weekly celebration of the same religious event basic to Christianity as is celebrated by Easter." (*Two Guys* record, p. 290.)

Those findings and statements by the Court clearly do not constitute an adoption by the trial court of appellant's *argument* in *Two Guys* that the 1959 Act was passed for religious reasons.

Appellants in *Two Guys* also contend that the present case is different from *Friedman* v. *New York*, 341 U. S. 907 (1951), because there is here an explicit finding of religious purpose. (*Two Guys* brief, p. 29.) There is no such finding. All that the Court said on this point was, "The *historical* religious connection is so clear in both state statutes as to be obvious and indisputable." (*Two Guys* record, p. 281, emphasis added.) Moreover, the Court was there referring not to the 1959 Act but to the 1939 Pennsylvania general Sunday closing law. (*Two Guys* record, p. 279-281.)

Appellants contend that all the indicators of the secular purpose of Pennsylvania's 1959 Sunday retail closing law are to be disregarded in favor of finding a religious purpose for that statute because in *Commonwealth ex rel.* v. *American Baseball Club of Philadelphia*, 290 Pa. 136, 143, 138 A. 497, 499 (1927), the Pennsylvania Supreme Court stated:

> "Christianity is part of the common law of Pennsylvania (Updegraph *v.* Com., 11 S. & R. 393) and its people are christian people. Sunday is the holy day among christians. * * *"

Appellants fail to disclose what the court intended when it said, "Christianity is part of the common law of Pennsylvania. * * *" It is most enlightening, therefore, to examine the *Updegraph* case, which was cited for that proposition.

Updegraph involved a conviction for blasphemy, and the court had occasion, as a basis for its decision, to consider the history of the founding of Pennsylvania as a British colony.[10] It will be recalled that Pennsylvania's founder, William Penn, was a Quaker and had been persecuted and imprisoned in England because of his religious beliefs. In recognition of his father's service to the Crown as an Admiral, Penn was granted a charter to found a new colony, which became the Commonwealth of Pennsylvania. Unlike some of the other colonies founded by religious minorities escaping from religious persecution, Pennsylvania did not in turn persecute those with religious convictions and practices contrary to those of the Quakers. The Quakers have not even proselyted but have maintained that each man is entitled to seek his own way to God and to worship as he sees fit.

In the course of the *Updegraph* opinion, the Pennsylvania Supreme Court said the following:

> "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, *William Penn;* not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes, and spiritual courts; but Christianity with liberty of conscience to all men. *William Penn* and Lord *Baltimore*

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[10] See, generally, Bolles, Pennsylvania Province and State; Vol. II (1899); Dunaway, A History of Pennsylvania (1935); Graeff, The History of Pennsylvania (1944); Keith, Chronicles of Pennsylvania, Vol. I (1917).

were the first legislators who passed laws in favour of liberty of conscience; for before that period the principle of liberty of conscience appeared in the laws of no people, the axiom of no government, the institutes of no society, and scarcely in the temper of any man. Even the reformers were as furious against contumacious errors, as they were loud in asserting the liberty of conscience. And to the wilds of America, peopled by a stock cut off by persecution from a Christian society, does Christianity owe true freedom of religious opinion and religious worship. * * *" 11 S. & R. 394, 400 (Pa. 1824)

"As I understand this writ of error was taken out with a view to decide the question, whether Christianity was part of the law of the land, and whether it was consistent with our civil institutions, I have considered it a duty to be thus explicit. No preference is given by law to any particular religious persuasion. Protection is given to all by our laws. It is only the malicious reviler of Christianity who is punished. By general Christianity is not intended the doctrine of worship of any particular church or sect; the law leaves these disputes to theologians; it is not known as a standard by which to decide political dogmas. The worship of the Jews is under the protection of the law. * * * It is not now, for the first time, determined in this court, that Christianity is part of the common law of Pennsylvania. In the case of the *Guardians of the Poor* v. *Greene*, 5 Binn. 555, Judge BRACKENRIDGE observed, the church establishment of *England* has become a part of the common law, but was the common law in this particular, or any part of it, carried with us in our emigration and planting a colony in Pennsylvania? Not a particle of it. On the contrary, the getting quit of the ecclesiastical establishment and tyranny, was a great cause of the emigration. All things were reduced to a primitive

Christianity, and we went into a new state. And Chief Justice TILGHMAN observes, that every country has its own common law; ours is composed partly of our own usages. When our ancestors emigrated from *England*, they took with them such of the *English* principles as were convenient for the situation in which they were about to be placed. It required time and experience to ascertain how much of the *English* law would be suitable to this country. The minds of *William Penn* and his followers would have revolted at the idea of an established church. Liberty to all, preference to none; equal privilege is extended to the mitred Bishop and the unadorned Friend.

"This is the Christianity which is the law of our land, and I do not think it will be an invasion of any man's right of private judgment, or of the most extended privilege of propagating his sentiments with regard to religion, in the manner which he thinks most conclusive. * * *" *Id.* at 408-409.

It is thus apparent that the recognition of "Christianity" as "part of the common law of Pennsylvania" is not an establishment of any Christian church or its doctrinal tenets but acceptance of the right of the individual to unfettered religious freedom, which doctrine formed the foundation for the First Amendment guarantee. It is the same belief which led Thomas Jefferson, a deist, to write the following language, quoted by this Court in its *Everson* decision, 330 U. S. at 12-13, in the preamble to the "Virginia Bill for Religious Liberty":

"Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either * * *;

that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern. * * *"

C. The Fact That Sunday Closing Laws May Originally Have Been Passed, and May Still Be Supported by Some Legislators, for Religious Reasons Is Irrelevant.

In the *Everson* case this Court stated:

"* * * The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." 330 U. S. at 6.

As has been pointed out above, Sunday closing laws have long been recognized as having a legitimate public purpose. The fact that legislators in the past have enacted such legislation because of religious motivation, or that some legislators even today support Sunday closing laws for the same reason, is irrelevant. This Court has not adopted, but has firmly rejected, any doctrine of unconstitutionality by association.

The question of legislative motive came before this Court in the classic case of *Soon Hing* v. *Crowley*, 113 U. S. 703 (1885). That case involved a San Francisco, California, ordinance regulating the establishment and maintenance of public laundries and wash-houses. The section of the ordinance under attack prohibited the washing and ironing of clothes between the hours of 10 p.m. and 6 a.m. and on Sunday. The defendant, who

was Chinese, attacked the ordinance principally on the ground that it was aimed at his race, "and not for any sanitary, police, or other purpose." The Court rejected that argument, holding that it could not inquire into legislative motive and stating:

> "* * * There is nothing, however, in the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. And the rule is general with reference to the enactments of all legislative bodies that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferrible from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretence." *Id.* at 710-11.

This Court has continued to adhere to that view. See, *e.g.*, *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 224 (1949), wherein the Court upheld a statute prohibiting individuals and companies from engaging in both the life insurance and undertaking businesses, stating:

"It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality. * * *

"We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop."

In passing, it is interesting to note that at the public hearing on the bill which became the 1959 Pennsylvania Sunday retail closing law, those speaking in favor included six labor leaders and seven representatives of business interests. Of the five clergymen and representatives of religious groups who spoke in favor, only one based his stand on religious reasons.[17]

D. The Coincidence of a Legislatively Established Common Day of Rest, Relaxation and Recreation With a Day of Religious Worship Does Not Constitute an Establishment of Religion.

Appellants are left only with the contention that the coincidence of the legislatively established common day of rest, relaxation and recreation with a day of Christian worship invalidates the 1959 Pennsylvania Act. That fact makes it easier for such persons to meet their religious obligations, but it can be asserted without fear of contradiction that many Christians do not believe that their religion requires them to refrain from working at their usual businesses on Sunday.

Coincidence of civil obligations with religious obligations is by no means uncommon and, in many areas of

[17] Transcript of Public Hearing Before House Rules Committee, re Senate Bill 405 (June 24, 1959).

conduct, almost unavoidable. However, that fact does not convert a statutory prohibition into an establishment of the religion which similarly commands. *Hennington* v. *Georgia*, 163 U. S. 299, 304 (1896); *State* v. *Shuster*, 145 Conn. 354, 557-558, 145 A. 2d 196, 197-198 (1958); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 215-216, 160 A. 2d 265, 273-274 (1960); *People* v. *Friedman*, 302 N. Y. 75, 79-80, 96 N. E. 2d 184, 186 (1950), *appeal dismissed*, 341 U. S. 907 (1951); *State* v. *Kidd*, 167 Ohio St. 521, 524-525, 150 N. E. 2d 413, 416-417, *appeal dismissed*, 358 U. S. 132 (1958). A great many of the limitations on conduct in our society in fact have their roots in the Judaeo-Christian tradition. It is inconceivable that the state could not prohibit certain types of conduct because such conduct was already prohibited by the Ten Commandments, or because it was prohibited by one religion but not by another, *e. g.*, polygamy condemned by Judaism and Christianity but approved by Mohammedanism and others. The applicable cases are discussed below in Section III-B of this brief in connection with prohibition of the free exercise of religion.

The selection of Sunday as a uniform day of rest is wholly logical in terms of the evolution of our culture. It is unquestionable that most Americans regard Sunday as a day when they should not be required to work. See *Two Guys from Harrison, Inc.* v. *Furman*, quoted at pages 12-13, *supra*. With the spread of the five-day week, most office workers and factory employees regard Saturday in the same vein. To try to select a uniform day of rest outside of the weekend would require a complete uprooting of our culture's weekly timetable.

Finally, enforcement is facilitated by the selection of a uniform day and one which coincides with the religious commands of some sects. The Pennsylvania court in *Commonwealth* v. *Bauder*, 14 Pa. D. & C. 2d 571, *aff'd p. c.*, 188 Pa. Super. 424, 145 A. 2d 915, *allocatur refused*, 188 Pa. Super. xxviii (1958), stated:

"If the day of rest chosen is one which the great majority of people are already bound by conscience to observe, the State will have the sanction of conscience as well as the fear of punishment as a motive for enforcement of its policy of relief from labor. Everyone connected with the enforcement of law can testify to the support given to the maintenance of law and order by those who obey the law from conscience rather than from fear of punishment.

"It can be readily seen that selecting a specific day greatly aids in the enforcement of the law. If a person is found engaging in worldly employment on a Sunday, he is guilty. He is also more conspicuous and easier to detect than he would be if others were legally employed in the same occupation on that day. To permit a person to rest on a day of his own choice would compel the Commonwealth to prove which was the day of his choice and that he had not rested on that day or if he had no day of his own choice to prove that he had worked on each of the other six days of the week. Any such requirement would practically nullify the law." 14 Pa. D. & C. 2d at 579, 145 A. 2d at 919.

III. The 1959 Pennsylvania Sunday Retail Closing Law in No Way Prohibits the Free Exercise of Religion in Violation of the Due Process Clause of the Fourteenth Amendment.

Appellants here are not seeking religious freedom at all, but economic freedom. Appellants contend that, because they have voluntarily sacrificed the business opportunities of Friday night and Saturday in recognition of their religious obligations, they should be afforded an opportunity on Sunday to recoup a portion of those losses even though Pennsylvania has validly determined that Sunday shall be the uniform day of rest, relaxation and recreation.

There are, to the knowledge of intervening defendant, only two cases in which Sunday closing laws have heretofore been challenged on the ground that such legislation prohibits the free exercise of religion: *Friedman* v. *New York*, 341 U. S. 907 (1951), wherein the appeal was summarily dismissed for want of a substantial federal question; and *Crown Kosher Super Market of Mass., Inc.* v. *Gallagher*, 176 F. Supp. 466 (D. Mass. 1959), *probable jurisdiction noted*, 362 U. S. 960 (1960). Appellants' attempt to distinguish the *Friedman* case factually (Appellants' brief, p. 15) can be of no constitutional aid to their position. Intervening defendant respectfully submits that the decisions of this Court in *Friedman* and of the court below in the instant case are correct, and that the contrary conclusion in the *Crown Kosher* case is erroneous.

A. Economic Sacrifices Voluntarily Made for Religious Reasons Should Not Excuse One From the Uniform Application of State Laws.

The question here presented is remote from any considered by this Court in its many decisions involving the free exercise of religion. It is appropriate, therefore, before turning to the decided cases, to dissect appellants' argument to determine whether enforcement of the 1959 Pennsylvania Sunday retail closing law against appellants in fact presents an issue of freedom of religion.

Appellants' argument is as follows: as Orthodox Jews they are obligated to observe the Jewish Sabbath and to close their retail stores on Friday evening and Saturday, during which time their competitors enjoy their greatest sales volume; the 1959 law prohibiting Sunday retail selling prevents appellants from recouping at least a portion of the business which they lose by closing on the Jewish Sabbath; this loss of business will be sufficiently substantial to require them to make a choice between abandoning their business or abandoning their religion; the statutory imposition of this choice constitutes an

unconstitutional abridgement of the free exercise of Orthodox Judaism. By the same reasoning, appellants contend that Orthodox Judaism will be unconstitutionally hindered in its ability to compete with other sects for adherents.

The facts of this appeal do not fall within the usual type of restraint upon religion, if they constitute a restraint at all. There is clearly no state interference in the usual sense with religious beliefs, with the advocacy thereof, with attendance at religious services, or with adherence to any practices dictated by the appellants' religion. All that Pennsylvania has done is to require enterprises other than those which are necessary, charitable, or recreational, to close on Sunday under penalties which are severe in the case of retail establishments selling certain commodities.

In determining whether the 1959 Pennsylvania Sunday retail closing law truly impinges upon appellants' religious freedom, four observations are pertinent:

1. The familiar litigated restraints upon religion fall equally upon all members of the complaining religious sect. Here, however, the statutory impact is not upon Orthodox Jews as such but only upon an economically defined segment of that sect—retail merchants.

2. The statute applies to the retail sale of the described commodities without regard to the religion of the seller. Retailers other than strict Sabbatarians, *viz.*, Two Guys from Harrison, complain in the companion Pennsylvania case now before this Court[18] that enforcement of the 1959 Act will render their enterprises unprofitable.

3. Appellants have chosen a business in which Friday night and Saturday are described by them as "the best shopping evening and shopping day," and their chosen religion prohibits labor during this period. This "competitive disadvantage" of loss of Friday night and

[18] *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36.

Saturday business would be present whether or not there was in force a Sunday retail closing law.

4. The "compulsion" which appellants complain the 1959 Pennsylvania Sunday retail closing law visits upon them is by no means unique to Sunday closing laws but can result from the application of many general laws to any individual whose conduct is already regulated by religious convictions. For example, it exists for the Catholic who, for religious reasons, supports a private school system while also being compelled by the state to support a public school system.

By attempting to equate the loss of business resulting from state prohibition of Sunday retail selling with their own voluntary sacrifice of Friday night and Saturday business, appellants only confuse the issues of this case. When appellants' argument is analyzed, it is clear that they urge only that, because they find it difficult to meet the financial sacrifices imposed by their religious obligations, the community interest in a uniform day of rest and recreation should be set aside. This Court should reject that argument and hold that sacrifices voluntarily assumed for religious reasons do not excuse one from the application of otherwise proper statutory regulation.

B. The Decisions of This Court Do Not Support Plaintiffs' Contention That There Is Here a Prohibition on the Free Exercise of Religion.

While none of this Court's decisions involving free exercise of religion is directly in point, those decisions nonetheless clearly demarcate the respective areas over which church and state have controlling jurisdiction. The "wall of separation between church and State" erected by the First Amendment is not like "one-way" glass, designed to operate in one direction only. "* * * The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from reli-

gious interference. * * *'" *Everson* v. *Board of Education*, 330 U. S. 1, 15 (1947). It is the position of intervening defendant that the adoption of appellants' argument will breach the wall of separation and exalt church over state, thereby restricting the state's power to legislate for the public welfare.

Since appellants cannot charge Pennsylvania with their loss of business during the Jewish Sabbath, our analysis must be in terms of the loss of Sunday business which would result from the enforcement against appellants of the 1959 Pennsylvania Sunday retail closing law. Logically, the constitutional question of free exercise of religion would arise only if the Jewish religion required appellants to work either six days a week or expressly on Sundays.[12] Even under those circumstances, the decisions of this Court hold that the prohibition would not be unconstitutional. *A fortiori*, Sunday work in which appellants indulge only because they close their shops during the Jewish Sabbath cannot conceivably rise to the stature of a constitutionally protected religious right. The fact that Sunday closing may result in financial loss does not entitle appellants' custom to greater constitutional protection.

This Court has consistently held that religious practices—as opposed to religious beliefs and the propagation thereof—must yield to social policies embodied in legislation. Otherwise, "the professed doctrines of religious

[12] In appellant's brief on appeal in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, October Term, 1960, No. 36, there is quoted from Dr. Sidney B. Hoenig's testimony in that action language which implies that Orthodox Jews are required to work at their usual occupations six days a week (*Two Guys* brief, p. 4a). This implication was dispelled on cross-examination, including questions from Judge Hastie (*Two Guys* record, pp. 76-79). And at pages 77-78, Dr. Hoenig stated:

> "If he [the Orthodox Jew] has enough funds to support himself that is his own private recognition, he can do whatever he pleases, he doesn't have to work all week. The only thing he has to do something of a gainful value for society. He has to do something, even on a Sunday, for the promotion of the weal and comfort of the entire group."

belief [would be] superior to the law of the land, and in effect . . . [would] permit every citizen to become a law unto himself." *Reynolds* v. *United States*, 98 U. S. 145, 167 (1878).

The *Reynolds* case and *Davis* v. *Beason*, 133 U. S. 333 (1890), sustained sanctions on the practice of polygamy against attack by Mormons. Since the statutes challenged were federal acts for the government of territories, First Amendment guarantees of religious freedom were applicable and were considered by the Court. In *Davis* this Court confined the protection afforded by the free exercise clause to *religious beliefs*—relations between man and his God—as opposed to particular practices of individual cults or sects:

> "* * * With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. * * *" *Id.* at 342-343.
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> "* * * the only question that remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. * * *" *Id.* at 344.

In *Hamilton* v. *Board of Regents*, 293 U. S. 245 (1934), this Court sustained regulations of state land grant colleges requiring male students to participate in military training. Justices Cardozo, Brandeis and Stone, concurring, assumed that First Amendment guarantees were made applicable to the states by the Fourteenth Amendment. Mr. Justice Cardozo, author of the concurring opinion, stated:

> "Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were thus extended, might refuse to contribute taxes in furtherance of a war, * * * or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. * * *" *Id.* at 268.

The several cases subsequently decided by this Court involving the "free exercise" clause in no way derogate from the principles enunciated in the *Reynolds* and *Davis* cases and restated by the Mr. Justice Cardozo, concurring, in *Hamilton* v. *Board of Regents*. "The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth [citing the *Davis* and *Reynolds* cases, *inter alia*, in a footnote]. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make prohibitions of the First applicable to state action abridging religious freedom. * * *" *Everson* v. *Board of Education supra*, 330 U. S. at 14-15.

In *Cox* v. *New Hampshire*, 312 U. S. 569 (1941), for example, this Court upheld an ordinance requiring licensing of street parades against a freedom of religion attack by Jehovah's Witnesses on the ground that the ordinance was a valid exercise of the police power to control city streets. There was "[n]o interference with religious worship or the practice of religion in any proper sense. * * *" *Id.* at 578. See also *Cleveland* v. *United States*, 329 U. S. 14, 20 (1946), where this Court summarily rejected a religious freedom attack on the application of the Mann Act to members of a "fundamentalist" Mormon sect practicing polygamy.

From these decisions of this Court, it seems clear that even if Orthodox Judaism *required* its adherents to work at their usual employment on Sunday, Pennsylvania could constitutionally prohibit such a religious practice if contrary to the community interest in a uniform day of rest.[20] Here, however, the alleged religious interference is even more remote. Appellants admittedly are attempting only to recoup on Sunday the sales they lose by closing on Friday night and Saturday. (Appellants' brief, p. 14.) No decision of this Court has ever suggested that, when individuals make economic sacrifices for religious reasons, the Federal Constitution requires the state in general legislation to reward them with an exemption.

It is appropriate at this point to quote from this Court's opinion in *Zorach* v. *Clauson*, *supra*:

> "It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any." 343 U. S. at 311.

[20] *Amici* concede that "religious conviction in seven days' labor weekly would not render unconstitutional a statute requiring one day rest in seven." (*Amicus* brief, p. 29.)

C. Neither the "Clear and Present Danger" Test Nor Any Other Special Standard of Constitutionality Is Applicable Here.

Both appellants (Appellants' brief, pp. 18-19, 24-29) and *amici curiae* Synagogue Council of America and National Community Relations Advisory Council (*Amicus* brief, pp. 29-32) urge that the "clear and present danger" test must be applied in determining the constitutionality of the 1959 Pennsylvania Sunday retail closing law. It is the position of intervening defendant that the clear and present danger test is not properly applied in this case. First, the 1959 Pennsylvania retail closing law imposes no constitutionally cognizable interference with appellants' freedom of religion to which the test might be applied; and, second, the clear and present danger test is to be applied only to direct statutory interference with religious beliefs and the expression thereof.

Appellants do not assert that their religion requires them to keep their shops open on Sunday. It is not contended by them that the alleged religious interference results from the fact that their shops must close on Sunday. Rather it is interference with their Sabbath observance of which appellants complain. We respectfully urge that the "compulsion," or temptation if you will, for appellants to abandon Sabbath observance by opening their shops on Friday night and Saturday stems, not from any legislative interference with appellants' religious freedom, but from the fact that appellants are economically or financially motivated to avoid the sacrifices which their religion requires. Appellants' financial and economic motivation cannot transform an otherwise constitutional secular statute into one impinging upon religious freedom. The clear and present danger test has no application in such a situation.

This Court has never applied the clear and present danger test in a case which involved only the issue of

freedom of religion. We do not say that freedom of religion is subject to any less protection than is afforded by other First Amendment guarantees, but only that by its very nature religious worship (man's beliefs and relations with his God), as distinguished from religious practices or activities, does not create any "danger."

With one exception, the decisions cited by appellants and *amici* in which this Court has applied the "clear and present danger" test did not involve religious freedom.[21] The one exception is *Board of Education* v. *Barnette*, 319 U. S. 624 (1943), where Jehovah's Witnesses challenged the compulsory flag salute. This Court, however, did not its decision on religious grounds, but held that the compulsory salute violated freedom of speech in the form of political expression.

It may well be that, as in the *Barnette* case, when the exercise of religious freedom directly involves free speech, press, or assembly, the clear and present danger test might apply. All but one of the decisions of this Court in those areas have not reached that question because they have involved *arbitrary* refusals to permit the distribution of religious literature[22] or the holding of outdoor religious meetings in public places.[23] However, in *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), this Court ignored an opportunity, and thereby presumably refused, to make the clear and present danger test applicable to freedom of religion. In that case, a Jehovah's Witness sent a minor ward into the streets to sell religious pamphlets and was convicted for violation of a child-labor law. On appeal, the Witness relied on freedom of religion alone, *id.* at 164, and urged the absence of any clear and present

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[21] *Thomas* v. *Collins*, 323 U. S. 516 (1945); *Thornhill* v. *Alabama*, 310 U. S. 88 (1940); *Schenck* v. *United States*, 249 U. S. 47 (1919).

[22] *Tucker* v. *Texas*, 326 U. S. 517 (1946); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Largent* v. *Texas*, 318 U. S. 418 (1943).

[23] *Fowler* v. *Rhode Island*, 345 U. S. 67 (1953); *Kunz* v. *New York*, 340 U. S. 290 (1951); *Niemotko* v. *Maryland*, 340 U. S. 268 (1951).

danger to the child from such activity, *id.* at 167. Without any further mention of that test, this Court found the state's interest in the welfare of children controlling.

The guarantee afforded by the First Amendment freedom of religion entitles one to worship as he sees fit, and to preach about, and proselyte on behalf of, his religion. However, when acts or practices are involved which the state has concluded are undesirable, the fact that they may be religiously approved, or even encouraged, does not authorize their commission.

Appellants completely ignore the "worship-practice" dichotomy long recognized by this Court in its decisions circumscribing the limitations upon freedom of religion. *Amici*, however, concede that the religious freedom guaranteed by the Federal Constitution "does not embrace absolute 'freedom to act' and that all conduct 'remains subject to regulation for the protection of society'", citing *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940). (*Amicus* brief, p. 29). In that case, although this Court struck down a statute requiring a permit before soliciting funds for a religious cause on the ground that the statute lodged arbitrary power in the issuing official, it recognized that "even the exercise of religion may be at some slight inconvenience in order that the State may protect its citizens from injury. * * *" *Id.* at 306. This Court also recognized the power of a state to regulate the time and manner of solicitation in the interest of public safety, peace, comfort or convenience. *Id.* at 306-307.

Appellants also suggest (Appellants' brief, p. 17) that the prohibition of Sunday retail selling as enforced against them is the equivalent of a direct tax such as was stricken down by this Court in *Follett* v. *McCormick*, 321 U. S. 573 (1944). But that case and similar license tax cases (*Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943)) are in a class by themselves and hold that there cannot be a direct tax upon the exercise of a First Amendment right. This is wholly apart

from any clear and present danger test. Those cases struck down licensing taxes imposed on door-to-door salesmen as applied to Jehovah's Witnesses distributing religious literature. This Court exempted the Witnesses on the theory that the venture was *not principally commercial* but rather religious. Even if Sunday retail closing laws could be regarded as a "tax", it is clearly a "tax" on commercial ventures which applies irrespective of the religion of the retailer.

None of the authorities cited by appellants, and no decision of this Court, so much as suggests that legislation prohibiting conduct not directly related to speech, press and assembly must be justified by the showing of a clear and present danger in order to establish its constitutionality. Were that the requirement, the applicability of the "clear and present danger" test would be determined not by the type of activity sought to be regulated but by whether the activity were approved or encouraged by a particular religious group.

Apart from "clear and present danger," appellants argue that the rationale of the famous footnote 4 in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152-153 (1938), requires that "more exacting judicial scrutiny" be given to the present statute. In that case, as emphasized by appellants, this Court suggested that statutes "directed at particular religious, * * * or national, * * * or racial minorities" require "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than * * * most other types of legislation" and that "prejudice against discrete and insular minorities may be a special condition, * * * which may call for a correspondingly more searching judicial inquiry."

It is evident that such considerations can have no application here because the 1959 Pennsylvania Sunday retail closing law is not "directed at particular religious * * * [or any other] minorities." Nothing could make that fact clearer than the companion case now before this

Court which also challenges the 1959 Pennsylvania Act, *Two Guys from Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36. In that case, the three-judge District Court, in an opinion by Circuit Judge Hastie, described the 1959 Act as follows:

> "* * * In the present record it appears and we find that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff [a seven-day discount house operation] initiated and triggered new and rather large scale violations, and threats of others. It also appears in the testimony which is part of the legislative hearing on the bill which became the 1959 amendment of the Sunday closing law, that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of Sunday retail selling newly acute. It is probable that such considerations influenced the legislature's 1959 decision to make Sunday retail selling the subject of a new prohibitory enactment. * * *" 179 F. Supp. at 952.

It is obvious that, contrary to appellants' assertion (Appellants' brief, p. 29), the events described by Judge Hastie are highly relevant to the present case. In light of those events, the 1959 Pennsylvania Sunday retail closing law cannot conceivably be described as legislation "directed at particular religious * * minorities." The test of the *Carolene Products* footnote does not become applicable to a statute of general application simply be-

cause those affected include minority groups. Otherwise, the applicability of the test would be determined not by the character of the legislation in question but by the nature of its protagonists in the particular litigation.

IV. The 1959 Pennsylvania Sunday Retail Closing Law Does Not Create Unreasonable Classifications in Violation of the Equal Protection or Due Process Clause of the Fourteenth Amendment.

On this point, appellants in the present appeal rely upon the brief filed by appellants in *Two Guys from Harrison-Allentown, Inc. v. McGinley*, October Term, 1960, No. 36. Appellants in the latter action and *amici curiae* Synagogue Council of America and National Community Relations Advisory Council contend that the 1959 Pennsylvania Sunday retail closing law is unconstitutionally arbitrary in its coverage because it prohibits only sales at retail and then only of certain commodities. Moreover, it is urged that the exemption from the general Pennsylvania Sunday closing law of certain sports and amusement activities underscores the absurdity of the 1959 Act because it undermines the "uniform day of rest" rationale.

Having urged that Sunday closing laws are basically religious, *amici curiae* here and appellant in the *Two Guys* case then argue that the only rational "day of rest" statute would be one which imposed a puritanical Sunday. That argument has the virtue of consistency but overlooks completely the fact indicated in Section I of this brief that the Sunday which is now sought to be protected is not a religious holiday but rather a secular holiday, not only for rest and, if one so desires, religious worship, but also for relaxation and recreation, including attendance at professional athletic events and movies or a Sunday drive simply to see the countryside or to visit friends and places of interest.

The opposing *amicus* brief and appellant's brief in *Two Guys* seem to imply in their quotation of *Commonwealth* v. *Cavalerro* (Pa. Q. S., Phila., April 20, 1960) (*Amicus* brief, p. 35-36) that there is nothing illegal in the sale of commodities other than those specified in the 1959 Act. That is not so. The 1939 general Pennsylvania Sunday closing law prohibits all "worldly employment or business," except only "works of necessity and charity."[24] The difference between the 1939 statute and the 1959 Act is that the general law imposes only a nominal fine, whereas the 1959 Act provides for more substantial penalties.

Intervening defendant urges not only that it is unnecessary for the legislature to observe mathematical niceties in classification and that appellants bear a heavy burden to prove unconstitutional arbitrariness, but also that there is, in fact, a rational basis for the selectivity of the 1959 Act, whether that statute be considered as supplementary to the general Pennsylvania Sunday closing law or wholly apart therefrom.

A. Appellants Have the Burden of Proving the Unreasonableness of a Classification, and a Statute Will Not Be Held Unconstitutional on That Ground Unless There Is No Conceivable Reasonable Basis for the Classification.

The law with regard to the types of classification which are considered to work unreasonable discriminations, and therefore to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution,

[24] The commodities covered by the 1959 Act previously came within the ambit of the general Sunday closing law. Under the decisions of the Pennsylvania courts, to the extent that 1959 Act overlaps the general Sunday closing law, the new statute repeals the earlier one, leaving the latter in force as to activities not covered by the new law. *Commonwealth* v. *Brown*, 346 Pa. 192, 197, 29 A. 2d 793, 796 (1943); *Commonwealth* v. *Gross*, 145 Pa. Super. 92, 21 A. 2d 238 (1941). See also *Commonwealth* v. *Shimpeno*, 160 Pa. Super. 104, 50 A. 2d 39 (1946).

is clear. In *Morey v. Doud*, 354 U.S. 457, 463-464 (1957), this Court, quoting from *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955), pointed out that the Equal Protection Clause prohibits only "invidious discrimination." The Court then quoted the rules set forth in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9 (1911):

> "* * * 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. * * *"

B. Sunday Closing Laws Which Classify on a Commodity Basis, as Does the 1959 Pennsylvania Act, Have Been Almost Universally Sustained.

As noted above, the attack made on the 1959 Pennsylvania Sunday retail closing law is a two-pronged one based on both the limitation of the statute to the retail sale of certain commodities and the exclusion from the general Pennsylvania Sunday closing law of various sports and amusements. The basic flaw in the argument is that it fails to recognize that the 1959 Act treats in the same fashion all who sell the same commodity at the same level

in the channels of distribution. This is probably the reason why this Court has in the last decade dismissed appeals for want of a substantial federal question from every challenge to Sunday closing laws on a classification basis. *Grochowiak v. Pennsylvania*, 358 U. S. 47 (1958); *Ullner v. Ohio*, 358 U. S. 131 (1958); *Gundaker Central Motors v. Gassert*, 354 U. S. 933 (1957); *Towery v. North Carolina*, 347 U. S. 925 (1954); *Friedman v. New York*, 341 U. S. 907 (1951).

The argument that Sunday legislation is discriminatory when it fails to prohibit *all* worldly employment and business activities was rejected by the Pennsylvania Supreme Court in *Bothwell* v. *City of York*, 291 Pa. 363, 140 A. 130 (1927). That case involved a municipal ordinance which prohibited certain amusements on Sundays while permitting others. The Court stated:

> "The council of York selected amusements which in its discretion it considered proper to prohibit by ordinance on the Sabbath day, and the weight of this enactment falls alike on all persons convicted of engaging in such unlawful operations. The ordinance discriminates against no persons or class of persons and surely it is not for appellant to say that the ordinance is void because it does not prohibit other acts equally mischievous as the acts prohibited. * * * The discriminations open to objection are those where persons engaged in the same business are subjected to different restrictions, or held entitled to different privileges under the same conditions. It is only then that the discriminations can be said to impair that equal right which all can claim in the enforcement of the law. *Soon Hing* v. *Crowley*, 113 U. S. 703, 5 S. Ct. 730, 28 L. ed. 1145." 291 Pa. at 370-371, 140 A. at 132.

A similar unsuccessful attack was made on the Pennsylvania Act prohibiting only the showing of movies

on Sunday, except when approved by local option, in *Commonwealth* v. *Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145, *allocatur refused*, 184 Pa. Super. xxvii (1957), *appeal dismissed*, 358 U. S. 47 (1958). The Court stated:

> "There is no merit in the contention that appellant has been denied due process and equal protection on the ground that the Act is discriminatory in its terms because it fails to include in its subject matter all worldly amusements on Sunday, subjecting them to a prohibition similar to that against the showing of motion pictures. *Bothwell* v. *York City*, 291 Pa. 365, 370, 140 A. 130. The appellant has relied on the principle of *Yick Wo* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064. That decision was considered in *People* v. *Orreck et al.*, 158 P. 2d 186 and the argument of a denial of equal protection of the laws was discarded in this language: 'Here the claimed discrimination is that those engaged in horse race betting are being prosecuted while those who run other types of illegal betting establishments are not. Such type of discrimination, if discrimination it be, is not within the rule of the above cases. It is not a denial of equal protection that one guilty person is prosecuted while others equally guilty are not.' The discussion in *Bothwell* v. *York City*, *supra*, p. 370, is to the same effect.
>
> "Finally there is no merit in the contention that the Act works an unreasonable classification. The relevant governing principles are stated in *Seabolt* v. *Commissioners*, 187 Pa. 318, 323, 41 A. 22, thus: 'Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subject classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine the courts cannot declare the classification

void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification.' That is a correct statement of the present law in Pennsylvania. Cf. *Garrett* v. *Turner*, 235 Pa. 383, 389, 84 A. 354; *Nat. Transit Co. et al* v. *Boardman*, 328 Pa. 450, 197 A. 239." 184 Pa. Super. at 527-28, 136 A. 2d at 148.

In other jurisdictions considering the constitutionality of similar Sunday legislation, the overwhelming number of courts have found that the classifications made by specific statutes and by exceptions to general statutes do not violate the Equal Protection Clause. See, *e.g.*, *Lane* v. *McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953); *State* v. *Shuster*, 145 Conn. 344, 143 A. 2d 196 (1958); *State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956); *Humphrey Chevrolet* v. *City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1956); *Two Guys from Harrison, Inc.* v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), *appeal dismissed*, 341 U. S. 907 (1951); *State* v. *Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413, *appeal dismissed*, 358 U. S. 132 (1958); *State* v. *Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). See also 50 Am. Jur., Sundays and Holidays § 11 (collecting cases).

In almost all of the few decisions which have held Sunday laws unconstitutional, the statutes involved classified the exemptions by businesses rather than by commodities. *Elliot* v. *State*, 29 Ariz. 389, 242 Pac. 340 (1926); *Gaetano Bocci & Sons Co.* v. *Town of Lawndale*, 208 Cal. 720, 284 Pac. 654 (1930); *Allen* v. *City of Colorado Springs*, 101 Colo. 498, 75 P. 2d 141 (1937); *Denver* v. *Bach*, 26 Colo. 530, 58 Pac. 1098 (1889); *Henderson* v. *Antonacci*, 62 So. 2d 5 (Fla. 1952); *City of Mt. Vernon* v. *Julian*, 369 Ill. 447, 17 N. E. 2d 52, 119 A. L. R. 747 (1938); *Ex parte Hodges*, 65 Okla. Crim. 69, 83 P. 2d 201 (1938); *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939

(1943). The discrimination between, for example, a grocery store which is not allowed to open, and a fruit stand which is allowed to open and sell the same items which would be available in the grocery store, is readily apparent.

City of Springfield v. *Smith*, 322 Mo. 1129, 19 S. W. 2d 1 (1929), cited by *amici*, turns on a special constitutional provision which, according to the court, made inapplicable opinions in other jurisdictions holding that the legislature is the judge of wisdom of classifications. 322 Mo. at 1138, 19 S. W. 2d at 3-4. The Missouri Constitution prohibited special laws where general laws could be made applicable and expressly gave the determination of the latter fact to the courts. 322 Mo. at 1138, 19 S. W. 2d at 4.

The *Smith* decision is significant, however, in its rejection of the position taken by some courts that a statute which does not prohibit all activities except matters of charity and necessity is not legitimate day of rest legislation. *E. g., Kelly* v. *Blackburn*, 95 S. 2d 260 (Fla. 1957); *Ex parte Ferguson*, 62 Okla. Crim. 145, 70 P. 2d 1094 (1937); *Gronlund* v. *Salt Lake City*, 113 Utah 284, 194 P. 2d 464 (1948); and the two Philadelphia trial court opinions relied upon by appellants in the *Two Guys* case. That question is fully treated below in Section IV-D of this brief.

C. The 1959 Pennsylvania Sunday Retail Closing Law Is Not Rendered Unreasonably Discriminatory by Reason of the Fact That It Imposes Heavier Penalties for Violation Than the General Pennsylvania Sunday Closing Law.

As is apparent from appellants' Amended Complaint, the "discrimination" about which appellants are most concerned is the fact that the 1959 Pennsylvania Sunday retail closing law imposes heavier penalties than does the Pennsylvania general Sunday closing law. In fact, the penalties under the new statute are sufficient, if enforced,

effectively to deter violators. As pointed out by appellant in the *Two Guys* case, disparate fines are also imposed by other Pennsylvania statutes regulating particular activities on Sunday. (*Two Guys* brief, p. 11.) The number of those disparities is of no particular importance and neither increases nor decreases the reasonableness of the imposition of heavier fines on appellants' activities by the 1959 Act.

Differential fines imposed by Sunday statutes were specifically upheld against similar challenges as long as 60 years ago. *State* v. *Hogriever*, 152 Ind. 652, 53 N. E. 921 (1899); *Sherman* v. *Mayor, and Aldermen of City of Paterson*, 82 N. J. L. 345, 82 A. 889 (1912). More recently, the Supreme Court of Indiana considered the same attack upon a statute prohibiting automobile sales on Sunday and again found nothing unreasonable in the fact that that statute imposed more substantial penalties than Indiana's general Sunday law. *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958). The Indiana court relied, *inter alia*, on the opinion of the late Chief Justice Vanderbilt of the New Jersey Supreme Court in *Gundaker Central Motors* v. *Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956), *appeal dismissed*, 354 U. S. 933 (1957). That opinion contains a comprehensive discussion of the question of classification with regard to the New Jersey Sunday automobile sales act, which discussion is equally applicable here:

> "The fact that the sale of motor vehicles is singled out for legislative treatment is no ground for complaint if there is any reasonable basis for such action, [citing cases]. And there is reasonable basis if the buying and selling of motor vehicles on Sunday has effects inimical to the public good and welfare. Under the police power 'the State may protect its citizens from physical and moral debasement which comes from uninterrupted labor'; see State *v.* Fair

Lawn Service Center, Inc., *supra*, 20 N. J. 468, 474, 483, 120 A. 2d 233, 241 (1956).

"In the present state of Sunday activity in this automotive age, there are sections of our highways stretching for miles almost exclusively devoted to the sale of new and used cars, where the owners and employees, forced by the unreasonable and competitive lust of some of their neighbors in the trade, are compelled to maintain their business vigil every day of the week and for long hours; who can say that this is not inimical to the public good? Moreover, common human experience has shown to all who have had the occasion to drive on the highways of this State that even a single business enterprise can constitute an insidious accident hazard when the highway on which it is situated is full with superpowered automobiles. Multiply this one instance by the number of dealers that are found, let us say, in the Little Ferry-South Hackensack area and see what the potential havoc is, to say nothing of the peace and tranquility that is incidentally disturbed.

"The State has an absolute right to enter here and force on all and every one so engaged regulations for the benefit of the public, and it is not for the court to say that its action in doing so is contrary to the constitutional provisions against discrimination merely because there are classes similarly situated with respect to public or social evils requiring similar legislation that are yet unregulated, Raymond *v.* Township Council of Teaneck, *supra*, 118 N. J. L. 109, 191 A. 480 (E. & A. 1937); Hertz Washmobile System *v.* Village of South Orange, 41 N. J. Super. 110, 124 A. 2d 68 (Law Div. 1956). As we have already indicated, the Legislature has a wide range of discretion in the choice of the means and methods by which it shall enhance the public good and welfare, Amodio *v.* Board of Commissioners of Town of West New York.

supra, 133 N. J. L. 220, 225, 43 A. 2d 889 (Sup. Ct. 1945)." 23 N. J. at 81-83, 127 A. 2d 572-3.

D. Rational Bases Exist for the Classification Made by the 1959 Pennsylvania Sunday Retail Closing Law.

1. The 1959 Act Strikes at an Area of Flagrant Violation of the Pennsylvania General Sunday Closing Law.

In recent years the small penalty imposed by the Pennsylvania general Sunday closing law led certain retail merchants to conclude that it would be profitable to flaunt that law. Those merchants decided that, inasmuch as most of the working population would be enjoying a day of rest, they could be enticed from their homes and recreation and into retail shops and shopping centers. In fact, the very existence of the Sunday closing laws created the largest number of potential buyers of any day of the week and the greatest opportunity for increased sales and profits.

It became apparent to the legislature that this increasing commercial activity on Sunday, the traditional day of rest, relaxation and recreation, was becoming a growing evil which soon would destroy the public good which the legislature sought to achieve through the Sunday closing laws. This evil first evidenced itself on a large scale in Sunday automobile sales.

As a result of Sunday sales by certain automobile dealers, other dealers who had obeyed the Sunday closing laws and remained open only six days of the week found it a competitive necessity likewise to flaunt the law. The result was that nearly all retail automobile dealers opened for business on Sunday. In order to combat this situation, the Pennsylvania legislature passed the Act of July 8, 1957, P. L. 565 §1, 18 Purdon's Pa. Stats. Ann. §4699.9, imposing substantially heavier fines on the sale of motor vehicles and trailers on Sundays. That statute has had no effect on the number of vehicles sold, but simply has

insured that in that business Sunday will be preserved as a day of rest, relaxation and recreation for employees.

The next major threat to Sunday as a day of rest, relaxation and recreation was the tremendous growth in retail selling of clothing, furniture, appliances, and certain other articles of personal property. Again, the economic effect of such operations ultimately would have been to force competitors who had previously observed the general Sunday closing law likewise to remain open seven days a week in order to meet this unlawful competition. In 1959 the legislature met this threat to Sunday rest, relaxation and recreation by the enactment of the statute attacked in this appeal.

With regard to the 1959 Pennsylvania Sunday retail closing law, the three-judge court in *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 179 F. Supp. 944, 952 (E. D. Pa. 1959), found that "the circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action." As appears from the opinion as quoted above at page 45, the record showed a chain reaction to the recent opening of "substantial suburban retail businesses" on Sunday and the ineffectiveness of the general Sunday closing law, with its $4 fine, to deter such violators.

As stated by Mr. Justice Douglas in *Williamson* v. *Lee Optical Company*, 348 U. S. 483, 487-488 (1955):

> "• • • [T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

2. Viewed Independently, the 1959 Act Prohibits Activities Which Impede Sunday Recreation

The "Sunday driver" is a well known phenomenon of modern America. The automobile conveys one to the

homes of relatives and friends, to the ball park, the movies, the seashore, and points of interest, or may be simply a means for escape from city and suburban developments into the countryside. The heavy volume of such Sunday traffic is well known to all. As pointed out above, the 1959 Pennsylvania Sunday retail closing law is aimed at commodities sold by large suburban retailers as well as by appellants. It is a matter of common knowledge, confirmed by the record in the *Two Guys* case, that such enterprises draw thousands of additional automobiles to one spot and create their share of traffic jams on already clogged highways on Sundays.

Appellants in the *Two Guys* Pennsylvania appeal, on which appellants here rely, complain of the differing treatment of wholesale and retail sellers of the same commodities. There is, in the first place, no suggestion that wholesalers have been engaging in Sunday selling to any extent. Moreover, the nature of business operations is such that wholesaling involves far fewer employees and customers in handling a given volume of goods than does retailing. For those reasons, Sunday operation of wholesale houses would neither involve as many employees nor create the traffic problems large-scale retail operations do.

Complaint is also made of an explicit exception from the 1959 Pennsylvania Sunday retail closing law, which prohibits the sale, among other things, of "* * * toys, excluding novelties and souvenirs. * * *" Adequate answer was given by the Virginia Hustings Court of the City of Richmond in *Mandell* v. *Haddon* (slip opinion, pp. 14-15, Aug. 9, 1960) in testing exactly the same exception in the 1960 amendment to the Virginia general Sunday closing law:

> "'With respect to 'toys', no doubt there can be a difference of opinion, particularly when 'novelties and souvenirs' are excluded. What the Legislature has really said here is that 'novelties and souvenirs' are

not 'toys', and indeed in the strict sense they are not. 'Novelties and souvenirs' are items casually purchased by the tourist or traveller as a permanent remembrance of his visit to a particular place (perhaps on a Sunday), to preserve and gaze upon with enjoyable recollection at a future date—something quite distinct from a 'toy' to be gradually or quickly worn out by the busy occupation of a child. And if a certain item is called a 'novelty or souvenir' by a store owner simply to evade the statute when in fact the item is a 'toy', the sale is prohibited and the statute is violated."

The exclusion of "novelties and souvenirs" thus serves to enhance public recreation in terms of Sunday visits to points of interest, whereas the commodities covered by the 1959 Pennsylvania Act can be conveniently purchased at other times.

Two Guys from Harrison, Inc. v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960), involved the 1959 New Jersey Sunday retail closing law. For reasons peculiar to the statutes there involved, the New Jersey Supreme Court held that the 1959 law completely superseded the New Jersey general Sunday closing law. Judge Burling, concurring, succinctly stated:

"* * * it is not apparent on the face of the statute that it is not a reasonable means of achieving a valid legislative goal: to free the highways from traffic caused by commercial activity to an extent sufficient to allow their unobstructed use by persons seeking relaxation." 32 N. J. at 237, 160 A. 2d at 285.

Chief Justice Weintraub, speaking for the Court, went into more detail:

"We have already described the evil to which the earlier Sunday legislation was addressed. The Constitution, of course, does not confine the Legislature to that conception of the evil. The Legislature may

take a different view of the scene and find the evil to be an impairment of public health, safety, morals and welfare, not because of the impact of uninterrupted labor, but rather because of unreasonable interference with the efforts of the vast majority of the citizens to find surcease from the pressures of the work week on the day generally selected by them for that purpose. Such is the conception of the evil which reasonably may be inferred from the title and terms of Chapter 119.

"The reasonableness of the classification of what may and may not be sold must be judged in the light of that conception of the evil. Upon that basis, classifications may be made which would be inadmissible where the purpose is to compel a day of rest. The legislative body may upon that approach classify operations upon such considerations as the amount of traffic, noise, or other bustle, and weigh those factors against, not necessity or charity, but rather relative utility or convenience to the public. See *Hertz Washmobile System* v. *South Orange, supra* (41 N. J. Super. at 122-23).

"Here the broad power to classify discussed in *Holderman, supra* (24 N. J. at 300-305), comes into play. In the absence of a compelling showing to the contrary, we must assume, as the facts may reasonably be, that the Legislature found the items dealt with by Chapter 119 are the ones which, above and beyond all others, are provocative of the problem; that the elimination of their sale on Sunday will remove the undue interference with the opportunity of the citizens for relief from the stress of everyday pursuits. Upon the stated thesis, the Legislature may indeed hit the evil where it is felt most in its quest for a reasonable balance of the interests involved. It may, as it did in *Gundaker Central Motors* v. *Gassert, supra* (23 N. J. 71), thus proceed in a single field, the sale of automobiles, without compulsion to search out

the evil everywhere. *Cf. Amodio* v. *Board of Commissioners of W. New York*, 133 N. J. L. 220 (Sup. Ct. 1945). It may, as in the case of Chapter 119, attack the problem in a wider sphere if it finds the evil there warrants legislation in the public interest. The Legislature may proceed experimentally, cautiously, step by step, until it finds the solvent. We must uphold a classification unless it is plainly demonstrated to be capricious. The required showing is not made merely by contrasting items which may and may not be sold. The relative utility of such items may be wholly unrelated to the degree of Sunday activity which their sale incites and to the relief which a ban upon them will accomplish. Nor would it be fatal if incongruities or problems of construction should develop in fringe areas. The Constitution does not demand mathematical perfection. *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, 96 L. ed. 367, 371 (1952). * * *" 32 N. J. at 228-229, 160 A. 2d at 280-281.

See also *City of Springfield* v. *Smith*, *supra*, 322 Mo. at 1141-1142, 19 S. W. 2d at 6.

CONCLUSION.

For the above reasons, intervening defendant Pennsylvania Retailers' Association respectfully requests this Court to affirm the decision of the court below.

Respectfully submitted,

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